

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Rules and Regulations Implementing the)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991)	
)	
Junk Fax Prevention Act of 2005)	CG Docket No. 05-338
)	
Petitions for Reconsideration and/or Declaratory)	
Ruling and Retroactive Waiver of 47 CFR §)	
64.1200(a)(4)(iv) Regarding the Commission's)	
Opt-Out Notice Requirement for Faxes Sent with)	
the Recipient's Prior Express Permission)	

ORDER

Adopted: March 4, 2020

Released: March 17, 2020

By the Commission: Commissioner Rosenworcel concurring.

I. INTRODUCTION

1. The Telephone Consumer Protection Act (TCPA), as amended by the Junk Fax Protection Act, prohibits any person from sending an “unsolicited advertisement” to a fax machine, and requires, among other things, that the sender of an unsolicited fax advertisement include notice and contact information to allow recipients to opt out of any future faxes from the sender.¹ In 2006, the Commission adopted the Solicited Fax Rule, which extended the Junk Fax Prevention Act’s opt-out notice requirements for unsolicited advertisements to *solicited* advertisements, i.e., those sent with the recipients’ “prior express invitation or permission.”²

2. In 2017, the United States Court of Appeals for the D.C. Circuit held that the Solicited Fax Rule was unlawful because it exceeded the Commission’s statutory authority under the TCPA.³ Pursuant to that finding, the Commission’s Consumer and Governmental Affairs Bureau (Bureau) eliminated the rule.⁴

¹ See 47 U.S.C. § 227(b)(1)(C).

² Former 47 CFR § 64.1200(a)(4)(iv) (Solicited Fax Rule); see also *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278 and 05-338, Report and Order and Third Order on Reconsideration, 21 FCC Rcd 3787 (2006) (*Junk Fax Order*).

³ See *Bais Yaakov of Spring Valley v. FCC*, 852 F.3d 1078, 1079, 1083 (D.C. Cir. 2017) (*Bais Yaakov*).

⁴ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005; Petitions for Declaratory Ruling and/or Retroactive Waiver of 47 CFR § 64.1200(a)(4)(iv) Regarding the Commission’s Opt-Out Notice Requirement for Faxes Sent with the Recipient’s Prior Express Permission*, CG Docket Nos. 02-278, 05-338, Order, 33 FCC Rcd 11179 (CGB 2018) (*2018 Dismissal Order*).

3. A group of plaintiffs involved in TCPA litigation filed an application for review of the Bureau's 2018 Dismissal Order, arguing that the rule should not have been eliminated.⁵ By this Order, we affirm the Bureau's decision and uphold its determination that the D.C. Circuit clearly found the Commission lacked statutory authority to adopt a rule requiring that solicited faxes include opt-out notices.⁶ We also take this opportunity to clear our backlog of requests related to the eliminated rule and dismiss as moot ten applications for review and one petition for reconsideration, thereby resolving all such pending requests. This order therefore resolves any remaining uncertainty among litigants about the status of the Solicited Fax Rule.

II. BACKGROUND

4. In 1991, Congress enacted the Telephone Consumer Protection Act (TCPA) to protect consumers from unwanted telephone calls and faxes.⁷ In relevant part, the TCPA prohibits the use of "any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement."⁸ In 1992, the Commission adopted rules implementing the TCPA.⁹

5. In 2005, Congress enacted the Junk Fax Prevention Act, amending the fax advertising provisions of the TCPA.¹⁰ Among other things, the law required the sender of an unsolicited fax advertisement to provide specified notice and contact information on the fax to allow recipients to opt out of any future faxes from the sender.¹¹ In 2006, the Commission adopted the *Junk Fax Order*, attempting to conform its rules to the Junk Fax Prevention Act.¹² As part of the *Junk Fax Order*, the Commission adopted the Solicited Fax Rule, which required senders to include opt-out notices on *solicited* fax ads, i.e., those sent with the recipients' "prior express invitation or permission."¹³

6. In 2010, Anda, Inc. sought a declaratory ruling on the Solicited Fax Rule. Anda asked the Commission to find: (1) that it lacked the authority to adopt the rule; or, in the alternative, (2) that Section 227(b) of the Act was not the statutory basis for it.¹⁴ In 2012, the Bureau dismissed Anda's petition, finding among other things that the Commission had the authority to adopt the rule and that Section 227(b) had been cited as authority for adopting the rule.¹⁵

⁵ See Application For Review of Gorss Motels, Inc. et al., CG Docket Nos. 02-278, 05-338 (filed Dec. 14, 2018) (Gorss Application).

⁶ See *Bais Yaakov*, 852 F.3d at 1079.

⁷ The TCPA is codified as Section 227 of the Communications Act of 1934, as amended, 47 U.S.C. § 227.

⁸ *Id.* § 227(b)(1)(C).

⁹ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Report and Order, 7 FCC Rcd 8752 (1992) (*1992 TCPA Order*); see also 47 CFR § 64.1200(a)(4).

¹⁰ See Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359 (2005) (Junk Fax Prevention Act); see also 47 U.S.C. § 227(b)(1)(C).

¹¹ See 47 U.S.C. § 227(b)(2)(D).

¹² *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278, 05-338, Report and Order and Third Order on Reconsideration, 21 FCC Rcd 3787 (2006) (*Junk Fax Order*); see also 47 CFR § 64.1200(a)(4).

¹³ 47 CFR § 64.1200(a)(4)(iv) (2018), held unlawful by *Bais Yaakov of Spring Valley v. FCC*, 852 F.3d 1078 (D.C. Cir. 2017); see also *Junk Fax Order*, 21 FCC Rcd at 3812, para. 48.

¹⁴ See generally Petition of Anda, Inc. for Declaratory Ruling to Clarify that 47 U.S.C. § 227(b) Was Not the Statutory Basis for Commission's Rules Requiring an Opt-Out Notice for Fax Advertisements Sent with Recipient's Prior Express Consent, CG Docket No. 05-338 (filed Nov. 30, 2010).

¹⁵ See *Junk Fax Prevention Act of 2005; Petition for Declaratory Ruling to Clarify that 47 U.S.C. § 227(b) Was Not the Statutory Basis for Commission's Rules Requiring an Opt-Out Notice for Fax Advertisements Sent with* (continued....)

7. Anda sought full Commission review of the *2012 Anda Order*.¹⁶ In 2014, the Commission denied Anda's application for review but granted a limited retroactive waiver of the Solicited Fax Rule because a footnote in the *Junk Fax Order* had created confusion regarding the applicability of the opt-out notice requirement to solicited faxes.¹⁷ Specifically, contrary to the rule but consistent with the statutory text, the footnote stated that "the opt-out notice requirement only applies to communications that constitute *unsolicited* advertisements."¹⁸ The *2014 Anda Commission Order* invited similarly situated parties to seek a retroactive waiver of the Solicited Fax Rule.¹⁹ The Bureau ruled on 163 waiver petitions in three orders.²⁰ Ten parties filed applications for review of one or more of these orders that are pending.²¹ One party's petition for reconsideration of the *2014 Anda Commission Order* is also pending.²²

8. Anda and other defendants in TCPA litigation jointly appealed the *2014 Anda Commission Order*, arguing that the Commission lacked authority under the Junk Fax Prevention Act to

(Continued from previous page)

Recipient's Prior Express Consent, CG Docket No. 05-338, Order, 27 FCC Rcd 4912, 4914, para. 5 (CGB 2012) (*2012 Anda Order*).

¹⁶ See Application for Review of Anda, Inc., CG Docket No. 05-338, at 10-13 (filed May 14, 2012).

¹⁷ See *Petition for Declaratory Ruling, Waiver, and/or Rulemaking Regarding the Commission's Opt-Out Requirement for Faxes Sent with the Recipient's Prior Express Permission*, CG Docket Nos. 02-278, 05-338, Order, 29 FCC Rcd 13998, 14008-12, paras. 22-31 (2014) (*2014 Anda Commission Order*). The Commission emphasized that full compliance with the Solicited Fax Rule would be required within six months from the release of the *2014 Anda Commission Order* (i.e., by April 30, 2015). See *id.* at 14011, para. 29.

¹⁸ See *Junk Fax Order*, 21 FCC Rcd at 3810, n.154 (emphasis added).

¹⁹ See *Anda Commission Order*, 29 FCC Rcd at 10411, para. 30.

²⁰ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005; Petitions for Declaratory Ruling and Retroactive Waiver of 47 CFR § 64.1200(a)(4)(iv) Regarding the Commission's Opt-Out Notice Requirement for Faxes Sent with the Recipient's Prior Express Permission*, CG Docket Nos. 02-278, 05-338, Order, 30 FCC Rcd 8598 (CGB 2015); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005; Petitions for Declaratory Ruling and Retroactive Waiver of 47 CFR § 64.1200(a)(4)(iv) Regarding the Commission's Opt-Out Notice Requirement for Faxes Sent with the Recipient's Prior Express Permission*, CG Docket Nos. 02-278, 05-338, Order, 30 FCC Rcd 14057 (CGB 2015); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005; Petitions for Declaratory Ruling and Retroactive Waiver of 47 CFR § 64.1200(a)(4)(iv) Regarding the Commission's Opt-Out Notice Requirement for Faxes Sent with the Recipient's Prior Express Permission*, CG Docket Nos. 02-278, 05-338, Order, 31 FCC Rcd 11943 (CGB 2016).

²¹ See Application For Full Commission Review of Bais Yaakov of Spring Valley et al., CG Docket Nos. 02-278, 05-338 (filed Sept. 25, 2015) (Yaakov Application); Application for Review of Craftwood Lumber Company, CG Docket Nos. 02-278, 05-338 (filed Sept. 28, 2015) (Craftwood Application); Application for Review of Edward Simon, DC, CG Docket Nos. 02-278, 05-338 (filed Sept. 28, 2015) (Simon Application); Application for Review of Craftwood II, Inc., dba Bay Hardware and Craftwood Lumber Company, CG Docket Nos. 02-278, 05-338 (filed Sept. 28, 2015) (Craftwood II Application); Application for Review of Beck Simmons, LLC et al., CG Docket Nos. 02-278, 05-338 (filed Sept. 28, 2015) (Simmons Application); Application for Full Commission Review of Renaissance Systems and Service, LLC, CG Docket Nos. 02-278, 05-338 (filed Jan. 8, 2016) (Renaissance Application); Application for Review of Wilder Chiropractic, Inc., CG Docket Nos. 02-278, 05-338 (filed Jan. 8, 2016) (Wilder Application); Application for Full Commission Review of Bais Yaakov of Spring Valley, CG Docket Nos. 02-2378, 05-338 (filed Dec. 1, 2016) (Bais Yaakov Application); Application for Review of West Loop Chiropractic & Sports Injury Center, Ltd. and West Loop Health & Sports Performance Center, LLC, CG Docket Nos. 02-278, 05-338 (filed Dec. 2, 2018) (West Loop Application); Application for Review of Lawrence S. Brodsky et al., CG Docket Nos. 02-278, 05-338 (filed Dec. 2, 2016) (Brodsky Application).

²² See *Petition of Florence Mussat, M.D., S.C. for Reconsideration of Retroactive Waiver to Power Liens, LLC*, CG Docket Nos. 02-278, 05-338 (filed Nov. 18, 2014) (Mussat Petition).

adopt the Solicited Fax Rule.²³ In March 2017, the U.S. Court of Appeals for the D.C. Circuit held that “the [Junk Fax Prevention] Act does not require . . . [an] opt-out notice on *solicited* fax advertisements . . . [n]or does the Act grant the FCC authority to require opt-out notices on solicited fax advertisements.”²⁴ The court thus concluded that the Solicited Fax Rule was unlawful.²⁵

9. As a result, in November 2018, the Bureau eliminated the Solicited Fax Rule, specifically former section 64.1200(a)(4)(iv).²⁶ The Bureau also dismissed as moot ten petitions for retroactive waiver and two petitions for reconsideration regarding the eliminated rule.²⁷

10. A group of plaintiffs involved in TCPA litigation filed an application for review of the *2018 Dismissal Order*.²⁸ In their application, these parties ask the Commission to vacate the Bureau-level order, arguing: (1) the court’s opinion was not a non-discretionary mandate to vacate the rule; and (2) the opinion did not, and could not, vacate the Solicited Fax Rule because the court was reviewing the *2014 Anda Commission Order* and not the 2006 *Junk Fax Order* that created the Solicited Fax Rule.

III. DISCUSSION

11. We find that eliminating the Solicited Fax Rule from the Code of Federal Regulations (CFR) was necessary and appropriate and therefore affirm the Bureau’s order eliminating the rule. The D.C. Circuit held “that the FCC’s 2006 Solicited Fax Rule is unlawful to the extent that it requires opt-out notices on solicited faxes.”²⁹ We find that allowing an unlawful rule to remain in the CFR serves no public interest and would instead create unnecessary confusion and consternation as stakeholders could not use the CFR to know what the law is without also being aware of and understanding the significance of the *Bais Yaakov* decision.

12. The Applicants posit two arguments to support their application for review, and we find neither argument merits disturbing the Bureau’s *2018 Dismissal Order*. First, the Applicants argue that the D.C. Circuit’s decision did not and could not vacate the Solicited Fax Rule because the only decision on review was the *2014 Anda Commission Order*.³⁰ As courts have found, however, the Solicited Fax Rule was struck down by the D.C. Circuit in *Bais Yaakov* even though the 2006 order adopting that rule was not technically before the Court. For example, in 2018 the United States Court of Appeals for the Ninth Circuit held that while “[i]t is, of course, true that *Bais Yaakov* reviewed a 2014 FCC order[,] . . . the validity of the 2014 order depended on the validity of the 2006 Solicited Fax Rule, and the court in *Bais Yaakov* squarely held that the underlying Solicited Fax Rule was invalid.”³¹ Similarly, in 2017 the United States Court of Appeals for the Sixth Circuit held that the *Bais Yaakov* “court was clear that the

²³ See Petition for Review of An Agency, Board, Commission, or Officer, *Bais Yaakov of Spring Valley v. FCC*, (D.C. Cir. Nov. 10, 2014) (No. 14-1234).

²⁴ See *Bais Yaakov*, 852 F.3d at 1082 (emphasis in original).

²⁵ See *id.* at 1083. The court’s mandate became effective on July 6, 2017. See Mandate, *Bais Yaakov of Spring Valley v. FCC*, No. 14-1234 (D.C. Cir. July 6, 2017) (issuance of formal mandate of Mar. 31, 2017 judgment).

²⁶ See *2018 Dismissal Order*, 33 FCC Rcd at 1183, para. 9.

²⁷ See *id.* at 1183, para. 10. Although the ten pending applications for review that are addressed herein were pending at the Commission when the Bureau issued the *2018 Dismissal Order*, the Bureau did not have delegated authority to resolve them. See 47 U.S.C. § 155(c); see also 47 CFR § 1.115.

²⁸ See Gorss Application.

²⁹ *Bais Yaakov*, 852 F.3d at 1083.

³⁰ See Gorss Application at 13.

³¹ *True Health Chiropractic, Inc. v. McKesson Corp.*, 896 F.3d 923, 930 (9th Cir. 2018).

‘Solicited Fax Rule is unlawful’ Thus, it was the Solicited Fax Rule itself that was struck down.”³² Because *Bais Yaakov* struck down the Solicited Fax Rule, the Bureau acted properly in eliminating that rule and, indeed, had no discretion but to do so.

13. As a separate and independent basis for this holding, we find that the Commission reopened the question of whether the Solicited Fax Rule was authorized by the statute when it issued the *2014 Anda Commission Order*, and therefore the Solicited Fax Rule was properly before the *Bais Yaakov* court on appeal. For example, the *2014 Anda Commission Order* undertook “‘a serious, substantive reconsideration of the [existing] rule.’”³³ The Commission’s examination of the statutory authority for the rule unfolded over three pages of its order, and it was the primary basis for the Commission’s rejection of the petition for declaratory ruling, waiver, and/or rulemaking. No case stands for the proposition that the substantive legal justification for an agency’s action is not subject to judicial review. In addition, the *2014 Anda Commission Order* was the first time the Commission had ever offered any legal rationale for the Solicited Fax Rule.³⁴ Under these circumstances, we find that the Commission reopened the question of whether the Solicited Fax Rule was authorized by the statute, and, hence, its “renewed adherence [was] substantively reviewable” by the court of appeals.³⁵

14. Second, the Applicants argue that the opinion of the D.C. Circuit was “not a non-discretionary mandate.” In other words, the Applicants argue that the Bureau was not required to vacate the Solicited Fax Rule, notwithstanding the decision of the D.C. Circuit Court. We disagree.

15. The D.C. Circuit explicitly concluded that the Commission was not authorized to enact a rule requiring opt-out notices on solicited faxes.³⁶ It held “that the FCC’s 2006 Solicited Fax Rule is unlawful to the extent it requires opt-out notices on solicited faxes.”³⁷ The court therefore vacated the *2014 Anda Commission Order* and remanded the matter to the Commission for further proceedings consistent with its decision.³⁸ Because the Solicited Fax Rule could no longer be viewed as lawful after the court’s pronouncement, the Bureau’s order eliminating the rule was not a discretionary implementation of the court’s mandate, which had issued on March 31, 2017. We also reject the Applicants’ notion that the Commission is not required to “acquiesce” to the court’s opinion.³⁹ As

³² *Sandusky Wellness Ctr. v. ASD Specialty Healthcare*, 863 F.3d 460, 467-68 (6th Cir. 2017), accord *Alpha Tech Pet Inc. v. Lagasse, LLC*, No. 16-C-4321, 2017 WL 5069946 at *3 (N.D. Ill. Nov. 3, 2017) (finding that “[t]he D.C. Circuit was clear and unequivocal [in holding that] the ‘Solicited Fax Rule is unlawful to the extent that it requires opt-out notices on solicited faxes,’ and agreeing with *Sandusky* that ‘[t]hus, . . . the Solicited Fax Rule itself . . . was struck down”).

³³ *P&V Enters. v. U.S. Army Corps of Eng’rs*, 516 F.3d 1021, 1024 (D.C. Cir. 2008) (alteration in original) (quoting *Nat’l Mining Ass’n v. U.S. Dep’t of the Interior*, 70 F.3d 1345, 1352 (D.C. Cir. 1995)).

³⁴ See *CTIA - The Wireless Ass’n v. FCC*, 466 F.3d 105, 112 (D.C. Cir. 2006) (finding reopening where the subsequent order “indisputably offers two new justifications not found” in the earlier order, and where those justifications “offer the Commission’s first explicit rationales” for the rule).

³⁵ See *Ass’n of Am. Railroads v. ICC*, 846 F.2d 1465, 1473 (D.C. Cir. 1988).

³⁶ See *Bais Yaakov*, 852 F.3d at 1082.

³⁷ *Id.* at 1083.

³⁸ See *id.*

³⁹ Gorss Application at 2. Applicants rely on *Nat’l Envtl. Dev. Ass’n’s Clean Air Project v. EPA*, 891 F.3d 1040 (D.C. Cir. 2018) (*NEDACAP*), for the proposition that the Agency is not required to implement policy based on the opinion of the first court to issue an order in a consolidated appeal on the subject. See Gorss Application at 11-13. *NEDACAP* is not a Hobbs Act case and is therefore irrelevant.

numerous courts have held, the D.C. Circuit's decision is binding on all other circuits.⁴⁰ The Commission is thus bound to comply with the D.C. Circuit's mandate.

16. In light of the Bureau's elimination of the Solicited Fax Rule, we also dismiss as moot the ten pending applications for review of the orders released in 2015 and 2016, as well as the pending petition for reconsideration of a grant of a retroactive waiver in the *2014 Anda Commission Order*.⁴¹ The D.C. Circuit has found the Solicited Fax Rule to be unlawful. Therefore, we find no need to consider the pending requests seeking review or reconsideration of the Commission's or the Bureau's application of the unlawful rule, which the Commission did not have the authority to adopt or enforce.⁴²

IV. ORDERING CLAUSES

17. Accordingly, IT IS ORDERED, pursuant to sections 4(i), 4(j), and 227 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), (j), 227, and section 1.115 of the Commission's rules, 47 CFR § 1.115, that the application for review filed by Gorss Motels, Inc., Compressor Engineering Corporation, Swetlic Chiropractic & Rehabilitation Center, Inc., Shaun Fauley, and JT's Frames, Inc. IS DENIED.

18. IT IS FURTHER ORDERED, pursuant to sections 4(i), 4(j), and 227 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), (j), 227, and section 1.115 of the Commission's rules, 47 CFR § 1.115, that the applications for review filed by (1) Bais Yaakov of Spring Valley, Roger H. Kaye, and Roger H. Kaye MD PC; (2) Craftwood Lumber Company; (3) Edward Simon, DC; (4) Craftwood II, Inc., dba Bay Hardware, and Craftwood Lumber Company; (5) Beck Simmons, LLC, Physicians Healthsource, Inc., Radha Geismann, M.D., P.C., Sandusky Wellness, LLC, Alan L. Laub, DDS, Inc., North Branch Pizza & Burger Co., True Health Chiropractic, Inc., Alan Presswood, D.C., P.C., Carradine Chiropractic Center, Inc., Christopher Lowe Hicklin, DC, PLC, J. Barrett Company, Central Alarm Signal, Inc., St. Louis Heart Center, Inc., Eric B. Fromer Chiropractic, Inc., Arnold Chapman, Shaun Fauley, Keith Bunch Associates, LCC, Michael C. Zimmer, D.C., P.C., Wilder Chiropractic, Inc., Law Office of Stuart R. Berkowitz, Proex Janitorial, Inc., and Italia Foods, Inc.; (6) Renaissance Systems and Service, LLC; (7) Wilder Chiropractic, Inc.; (8) Bais Yaakov of Spring Valley; (9) West Loop Chiropractic & Sports Injury Center, Ltd. and West Loop Health & Sports Performance Center, LLC; and (10) Lawrence S. Brodsky, JT's Frames, Inc., Career Counseling, Inc. dba Snelling Staffing Services, Big Thyme Enterprises, Inc., Whiteamire Clinic, P.A., Inc., Cin-Q Automobiles, Inc., Medical & Chiropractic Clinic, Inc., Shaun Fauley, St. Louis Heart Center, Inc., JWD Automotive, Inc., Russell M. Holstein, PhD, LLC, and Carradine Chiropractic Center, Inc. ARE DISMISSED as moot.

19. IT IS FURTHER ORDERED, pursuant to sections 4(i), 4(j), and 227 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), (j), 227, and section 1.106 of the

⁴⁰ See Administrative Orders Review Act (Hobbs Act), ch. 1189, 64 Stat. 1129, *codified at* 28 U.S.C. § 2342 *et seq.*; *see also Sandusky Wellness Ctr.*, 863 F.3d at 467; *Peck v. Cingular Wireless, LLC*, 535 F.3d 1053, 1057 (9th Cir. 2008); *MCI Telecomms. Corp. v. U.S. West Comms.*, 204 F.3d 1262, 1267 (9th Cir. 2000); *Brodsky v. HumanaDental*, 910 F.3d 285, 290 (7th Cir. 2018).

⁴¹ See Yaakov Application; Craftwood Application; Simon Application; Craftwood II Application; Simmons Application; Renaissance Application; Wilder Application; Bais Yaakov Application; West Loop Application; Brodsky Application; *see also* Mussat Petition.

⁴² The D.C. Circuit held that the Commission did not have the authority to adopt the Solicited Fax Rule in the first instance. *See Bais Yaakov*, 852 F.3d at 1082. The Solicited Fax Rule was therefore never legally valid or enforceable. *See, e.g., Dixon v. U.S.*, 381 U.S. 68, 74 (1965) ("The power . . . to prescribe rules and regulations . . . is not the power to make law[,] but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity." (citations omitted)).

Commission's rules, 47 CFR § 1.106, that the petition for reconsideration filed by Florence Mussat, M.D., S.C. IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary